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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-886

THE UPJOHN COMPANY and GERARD THOMAS,
Vice President, Secretary and General Counsel,
Petitioners,

v.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Special Agent, Internal Revenue Service,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Upjohn Company and Gerard Thomas pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the court of appeals (App. A. hereto) is reported at 600 F.2d 1223. The opinion of the United States Magistrate (App. B hereto) is not officially reported but is unofficially reported at 41 AFTR

2d 78-796 and 78-1 U.S.T.C. ¶ 9277. The order of the district court adopting the Magistrate's opinion (App. C hereto) and the Order of the district court enforcing the summons (App. D hereto) are not officially reported.

JURISDICTION

The opinion of the court of appeals was issued on June 28, 1979. A timely petition for rehearing was denied on September 10, 1979 (App. E hereto) and the mandate of the court of appeals was issued on September 17, 1979 (App. F hereto). This petition is filed within ninety days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between attorneys for a corporation and corporate employees, where the employees made the communications at the direction of their corporate superiors, the subject of the communications is a matter about which the attorneys' advice has been sought by the corporation, and the communications related to the performance by the employees of the duties of their employment.

2. Whether the work product of attorneys prepared in contemplation of possible litigation is protected against involuntary disclosure in response to a summons issued under 26 U.S.C. § 7602 by a special agent of the Criminal Investigation Division of the Internal Revenue Service.

STATUTES INVOLVED

The pertinent part of §§ 7402, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) is contained in Appendix G.

STATEMENT OF THE CASE

This case arises from a summons issued by a special agent of the Criminal Investigation Division of the Internal Revenue Service under 26 U.S.C. § 7602. The summons sought production of certain handwritten notes made by attorneys representing The Upjohn Company and responses received by those attorneys to a questionnaire which they prepared and sent principally to the managers of the Company's subsidiaries abroad. Production was refused by the general counsel of the Company on grounds, among others, that the documents demanded are protected against discovery by (i) the attorney-client privilege and (ii) the attorney work-product rule, as it has been defined by *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and Fed. R. Civ. P. 26(b)(3).

The documents sought by the Internal Revenue Service were prepared in the course of an investigation voluntarily instituted by Upjohn after the Company's independent public accountants found evidence that an improper payment might have been made overseas by one of the Company's foreign subsidiaries. Outside counsel was retained to advise the Company and each of its subsidiaries regarding various legal issues arising from such payments, including anticipated litigation. In conjunction with Upjohn's general counsel, the outside attorneys undertook to gather such information as they required to enable them to provide such

legal advice. The documents at issue in this case were all prepared in connection with that undertaking. The documents have remained confidential and have never been disclosed to anyone except counsel for the Company.

Before completion of their investigation, Upjohn's attorneys recommended that the Company make a preliminary report to the Securities and Exchange Commission regarding the questionable payments. Such a report was promptly made both to the SEC and to the Internal Revenue Service. Later, when additional information had been obtained, a more complete report was made by the Company to the SEC and the IRS. As a result of the disclosures, IRS reopened its audit of the Company's 1972 and 1973 consolidated federal income tax returns, and undertook a criminal investigation of the 1972, 1973 and 1974 returns. The summons from which this case arises was issued in conjunction with that investigation by a special agent in the Service's Criminal Investigation Division.

Enforcement of the summons was referred by the district court to a Magistrate, who concluded that application of the attorney-client privilege should be narrowly restricted to communications made to counsel only by members of a corporation's "control group". (App. B at 22a.) The Magistrate adopted the theory of a "control group" from certain earlier cases, in which such a group was generally defined to include only those persons who have a substantial role in formulating and deciding a corporation's responses to legal advice. The Magistrate reasoned that at least some of the employees from whom Upjohn's attorneys had obtained information were not members of such a

"control group." He also held that the Company's reports to the SEC constituted a waiver of any attorney-client privilege. (App. B at 24a.) Finally, the Magistrate concluded that the Service had made a sufficient showing of necessity to overcome the work-product rule. (App. B at 30a.) On the basis of these conclusions, he recommended to the district court that the summons be enforced. The district court did not prepare a separate analysis of the issues, but simply adopted the opinion of the Magistrate in a brief order. (App. C and D.)

The court of appeals recognized that the scope of the attorney-client privilege as applied to corporations is now disputed and uncertain. (App. A at 4a-5a.) It acknowledged that several other courts, "notably the Seventh and Eighth Circuits", have adopted wider and more flexible rules for the application of the privilege than that approved in this case by the district court. (App. A at 4a.) Under the rules adopted by the Seventh and Eighth Circuits, communications made to counsel by subordinate corporate employees are generally privileged if the subject matter of the communications is a matter about which counsel has been requested to provide legal advice and if it involves the performance by the employees of their corporate duties. Nonetheless, the Sixth Circuit rejected the rules adopted by the Seventh and Eighth Circuits, as well as other courts, and aligned itself with the Third Circuit and other courts which have approved the more restrictive "control group" test applied by the Magistrate. (App. A at 5a.)

The court of appeals held that Upjohn had not waived the protection of the attorney-client privilege with respect to the disputed materials, and found that

the Magistrate and district court had misapplied even the narrow "control group" test. With respect to the work-product rule, the court did not hold that the rule had been overcome by a showing of necessity, but instead stated in a brief footnote that the rule is entirely inapplicable to a summons issued by IRS under 26 U.S.C. § 7602. (App. A at 7a n.13.) The court remanded the case for the limited purpose of a determination as to which of the employees from whom Upjohn's attorneys received communications were part of the Company's "control group."

REASONS FOR GRANTING THE WRIT

This case presents for decision two important questions regarding the scope of application of the attorney-client privilege and the attorney work-product rule. Each of the questions has widespread significance beyond this case. Both issues are the subject of conflicting decisions by the courts of appeals, as well as numerous other federal courts. One of the issues was fully briefed and argued before this Court in the 1970 Term, but an equally divided Court was unable to reach a decision. Prompt and definitive resolution of both issues is fundamental for the orderly administration of justice and to resolve the conflict among the circuits. Unless authoritative guidance is now provided by this Court, important questions of law will remain disputed and uncertain, and counsel will be seriously hampered in their efforts to provide professional advice to corporate clients regarding a broad range of legal issues.

I.

Review By This Court Is Required to Establish the Scope of the Attorney-Client Privilege as Applied to Corporations.

The great bulk of business activity in this country is now conducted through corporate enterprises. In connection with their efforts to provide professional assistance to such enterprises, both inside and outside counsel necessarily must rely upon communications of pertinent information from corporate employees, some of whom frequently occupy subordinate corporate positions. It is imperative that counsel and their corporate clients have definitive guidance whether and in what circumstances such communications will remain confidential under the attorney-client privilege. Despite the obvious importance of clear and authoritative standards, however, the scope of application to corporations of the attorney-client privilege is now the subject of diverse and conflicting rules adopted by different courts of appeals and district courts. The result is confusion and uncertainty.

The decisions in this area fall broadly into three groups. The Seventh and Eighth Circuits have each held that the pri ilege is applicable to communications made to counsel by subordinate corporate employees. The standards adopted by the two circuits are not identical, but in general terms each holds that such a communication is privileged if it relates to a matter about which the corporation has sought the attorney's legal advice, if the communication was made in confidence, and if it relates to the performance of the employee's corporate duties. *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 606 (8th Cir. 1978) (en banc), *rev'g*

decision of original panel 572 F.2d 596 (1977); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970) (per curiam), *aff'd by an equally divided court*, 400 U.S. 348 (1971). Variants of this standard, which has been styled the "subject-matter" test, have also been adopted by many other federal courts.[1] These courts have emphasized that any more narrow or less flexible standard undermines the important policies served by the privilege and disregards the size and complexity of modern corporate enterprises.

Still other courts, particularly the Third Circuit, have rejected the subject-matter test and have instead adopted one variant or another of the rule approved by the court of appeals in this case. *E.g., In re Grand Jury Investigation (Sun Company, Inc.)*, 599 F.2d 1224 (3d Cir. 1979).[2] Under the "control group" test that has been adopted in such cases, the privilege is gener-

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[1] Securities and Exchange Commission v. Texas International Airlines, et al., F. Supp. , (D.D.C., No. 79-0126, August 3, 1979); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D. S.C. 1974); Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973); Leve v. General Motors Corp., 43 F.R.D. 508 (S.D.N.Y. 1967).

[2] *See also* Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) (dicta).

ally applicable to communications made to counsel only by senior corporate officers who "play a substantial role" in deciding and directing the corporation's response to the legal advice given. (App. A at 5a.)

A third group of courts has noted the conflicting standards that have been adopted by the various circuits, but avoided any resolution of the issue.[3] In these districts and circuits, corporate counsel have been left without any definitive guidance as to which, if any, of the conflicting standards will be applicable to the privilege. Finally, confusion has been intensified by the recommendations of commentators, who have urged the adoption of a wide range of standards, including the subject-matter and control group tests, as well as several variations upon and alternatives to those tests.[4]

Review by this Court is essential to resolve the existing confusion and uncertainty. This is not a matter as to which a multiplicity of standards in different dis-

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[3] In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc., 599 F.2d 504 (2d Cir. 1979), *rev'g* 81 F.R.D. 691 (S.D.N.Y. 1979); Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977); Perringnon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978); Securities and Exchange Commission v. Canadian Javelin Ltd., 451 F. Supp. 594, 598-99 (D.D.C. 1978); Federal Trade Commission v. Lukens Steel Co., 444 F. Supp. 803, 807 n.4 (D.D.C. 1977); Attorney General of the United States v. Covington & Burling, 430 F. Supp. 1117, 1121 (D.D.C. 1977).

[4] *E.g.*, Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977); Note, Evidence-Privileged Communications-The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360 (1970); Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424 (1970); Simon, The Attorney-Client Privilege Applied to Corporations, 65 Yale L. J. 953 (1956).

tricts and circuits can properly be tolerated. The conduct of corporate business activities commonly cuts across the geographic jurisdictions of many federal courts. When counsel seeks to provide legal advice to corporate clients, the district or circuit in which the transactions may become an issue frequently cannot be predicted. In such situations, it is not enough merely to anticipate that one standard for the application of the privilege may be applied by one court, and a conflicting standard by another court.

The existence of competing standards in some courts, and the absence of any defined standard in other courts, means that counsel are without any reliable basis at all upon which to assess the confidentiality of communications made to them by corporate employees. Under the conflicting rules that now exist, the same communications made by the same employees regarding the same transaction may be privileged in one court and subject to disclosure in another court. Without authoritative guidance from this Court, the application of an important legal principle will remain confused and uncertain, and the efforts of counsel to advise corporate clients regarding a wide variety of legal issues will continue to be severely impeded.[5]

Even apart from the perplexing conflict among the circuits with respect to this issue, review of this Court is needed to reverse the narrow and grudging interpre-

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[5] The importance of this issue is illustrated vividly by the fact that nine parties filed motions for leave to file briefs as *amici* when this Court considered the same issue during its 1970 Term, and affirmed Harper & Row Publishers, Inc. v. Decker, *supra*, by an equally divided Court. Among those filing briefs as *amici* were the American Bar Association, the Association of the Bar of the City of New York and New York County Lawyers' Association, and six other state bar associations.

tation of the attorney-client privilege adopted in this case. The privilege is intended to assure the availability of meaningful professional advice by encouraging uninhibited communications with counsel regarding relevant factual and legal matters. C. McCormick, *Evidence* § 96 at 195 (1954). This Court emphasized more than sixty years ago that unless the privilege is adequately protected and guaranteed, there will be a "pracical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915). *See also Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The effect of the narrow interpretation of the privilege adopted below is, however, to create precisely such a "practical prohibition" upon advice given to corporate enterprises.

Counsel can provide meaningful professional assistance to clients only if he first receives a full and candid disclosure of all of the information necessary to assess realistically the legal issues involved. Because of the size and complexity of many modern corporations, senior management often has only general and incomplete information regarding transactions about which legal advice is needed. As a result, much of the detailed factual information required by counsel must often be obtained from subordinate corporate employees, most or all of whom fall outside the narrow "control group" defined by the court of appeals.

If the rigid standard adopted below is permitted to prevail, corporate counsel will be confronted with a dilemma from which there can be no satisfactory escape. Counsel either must offer legal advice upon the basis of information that is likely to be seriously incomplete or must seek adequate factual information from less senior corporate employees outside the scope

of the privilege. If counsel elects the latter, he may thereby waive all protection by discussing privileged information with employees beyond the client's "control group". By so doing, counsel may adversely affect the interests of individuals as well as the corporation. Whatever choice counsel might make, the important public policies served by the attorney-client privilege would be defeated.[6]

The dilemma is illustrated clearly by this case. Upjohn's attorneys were required to provide legal advice regarding compliance with securities and tax laws, possible violations of foreign laws, currency restrictions, possible shareholder litigation, and other legal issues and possible litigation arising from questionable payments abroad. The Company's highest management was unable to provide all of the facts needed by counsel to formulate legal advice. As a result, Upjohn's attorneys were compelled to seek the information they required from a limited group of less senior corporate employees, including the managers of the Company's foreign subsidiaries. The persons from whom information was sought are all employees for whose conduct Upjohn may be liable, and whose knowledge may be imputed to it. To hold, as did the court of appeals in this case, that such communications are unprotected by

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[6] Without extended analysis, the court of appeals assumed that adoption of the broader subject-matter test might cause senior corporate managers "purposely to ignore important information." (App. A at 5a). There is no basis for any such assumption. To the contrary, corporate managers with responsibility for deciding major issues of corporate policy can be expected to continue to seek and receive such information as they believe appropriate to formulate such policies. Under any formulation of the privilege, corporate employees of all levels of seniority may be examined regarding their personal knowledge of disputed transactions.

the attorney-client privilege denies corporate enterprises any effective protection of the privilege and severely impedes the right of those enterprises to obtain informed legal advice.[7]

The narrow and rigid standard adopted in this case for application of the privilege also undermines other important public policies. Officials of the SEC, as well as other senior government spokesmen, have in recent years repeatedly emphasized that corporate counsel are expected to perform substantial roles in assuring corporate compliance with federal securities and other laws.[8] Special emphasis has been placed upon counsel's

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[7] Contrary to the assumption of the court of appeals in this case, a narrow interpretation of the scope of the attorney-client privilege is not required to assure full and adequate discovery. Using the generous discovery provisions of federal regulatory statutes and the Federal Rules of Civil Procedure, government investigators and private litigants may thoroughly interrogate corporate employees of every level of seniority regarding their knowledge of corporate conduct. Reasonable application of the privilege would mean only that such investigators and litigants could not seize for themselves the efforts of a corporation's own counsel to ascertain and evaluate the facts relevant to a disputed transaction. The inconvenience to an investigator or litigant of performing his own factual inquiries is clearly outweighed by the important policies served by the privilege. As Justice Jackson emphasized in Hickman v. Taylor, 329 U.S. 495, 516 (1947) (concurring opinion), "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

[8] *E.g.*, The Role of Inside Counsel in Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Seventeenth Annual Corporate Counsel Institute (Oct. 9, 1979), *reprinted in* 196 *Daily Report for Executives* (BNA), October 10, 1979, at B-1; Corporate Accountability, Address by Harold M. Williams, Chairman of the Securities and Exchange Commission, before the Fifth Annual Securities Regulation Institute (Jan. 18, 1978); Address by Stanley

role in preventing and detecting questionable business practices both in the United States and abroad.[9] Grudging application of the privilege inhibits corporate counsel from performing such activities, erodes the public policies which counsel have been instructed to serve, and undermines compliance with federal regulatory statutes.

All of the reasons that caused this Court to grant certiorari in the 1970 Term in *Harper & Row Publishers, Inc.* v. *Decker, supra,* now justify review in this case. The conflict among the circuits has not disappeared but instead has deepened and broadened. The confusion and uncertainty have become more serious and widespread. The continuing absence of authoritative standards for the application of the privilege to corporate clients has resulted in increasingly substantial impediments to the provision of professional advice to those clients. Guidance from this Court is needed to eliminate those impediments, dispel confusion and uncertainty, and resolve the conflict among the circuits.

Sporkin, Securities and Exchange Commission, before the Stamford, Conn. Area Commerce and Industry Ass'n (Mar. 15, 1977). *See also* Lorne, The Corporate and Securities Adviser, The Public Interest and Professional Ethics, 76 Mich. L. Rev. 423 (1978).

[9] *Id. See also* Speech of Stanley Sporkin, Securities and Exchange Commission, before the New York County Lawyers Ass'n. (April 7, 1976); Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, 67-68 (May 12, 1976). *Compare* SEC Staff Report, The Accounting Profession and the Commission's Oversight Role (July 1, 1978).

II.

Review by This Court Is Needed to Resolve Conflicting Decisions Regarding the Application of the Work-Product Rule to an Administrative Summons.

This case also presents a second and independent legal issue as to which review by this Court is clearly appropriate. As described above, Upjohn has consistently urged that the documents sought by IRS include notes and other materials that are the work product of the Company's counsel, within the meaning of *Hickman* v. *Taylor,* 329 U.S. 495 (1947), and Fed. R. Civ. P. 26 (b)(3). The court of appeals did not hold or even suggest that the materials are not properly characterized as the attorneys' work-product. Nor did it suggest that the rule is overridden in this case by any showing of necessity. Instead, it held in a brief footnote that the work-product rule is entirely inapplicable to an IRS summons issued under 26 U.S.C. § 7602. (App. A at 7a n.13).

The conclusion reached below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Brown,* 478 F.2d 1038, 1041 (7th Cir. 1973), which held that the work-product rule is applicable in proceedings to enforce an IRS summons. It is also inconsistent with the previous instructions of this Court regarding the significance and scope of application of the work-product rule in *United States* v. *Nobles,* 422 U.S. 225 (1975), and raises substantial constitutional issues under the Fifth and Sixth Amendments. Review by this Court is needed to resolve

the conflict among the circuits,[10] resolve the constitutional issues and restore the proper interpretation of an important legal principle.

The court below did not explain the reasons for its conflicting decision or even refer to the decision of the Seventh Circuit in *Brown*. Of the cases referred to by the court below, only *United States* v. *McKay*, 372 F.2d 174 (5th Cir. 1967), even discussed the issue. In *McKay*, however, the Fifth Circuit merely expressed doubt as to the applicability of the rule in summons enforcement actions and went on to conclude that the appraiser's report at issue there was "... in no sense the work product of the lawyer ...." *Id.* at 177.

Moreover, the doubts expressed in the Fifth Circuit's dictum in *McKay* were premised upon an assumption that no longer has validity. The court assumed that an analogy exists between summons enforcement actions and grand jury investigations, and further that the work-product rule might be inapplicable before a grand jury. It is now settled that the work-product rule is fully applicable to grand jury investigations. *In re Grand Jury Investigation (Sun Company, Inc.), supra; In re Grand Jury Subpoena Dated December 19, 1978, Issued to General Counsel, John Doe, Inc., supra; Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977); *In re Grand Jury Proceedings (Duffy)*, 473

[10] Even before the decision in this case, Mr. Justice White took notice of the conflicting authorities regarding the application of the work-product rule to a summons issued by IRS. United States v. Nobles, *supra* at 225, 247 n. 6 (1975) (concurring opinion). The decision in this case deepens rather than resolves the conflict among the circuits.

F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943, 946 (E.D. Pa. 1976); *Matter of Rosenbaum*, 401 F. Supp. 807, 808 (S.D. N.Y. 1975); *United States* v. *Mitchell*, 372 F. Supp. 1239, 1245 (S.D.N.Y. 1973); *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966). This Court expressly noted the numerous cases that have held the work-product rule applicable to grand jury proceedings in *United States* v. *Nobles, supra* at 238 n.12.

Accordingly, the premise of the only relevant authority relied upon by the court below, the dictum of the Fifth Circuit in *McKay*, has now been destroyed. In fact, the analogy perceived by the Fifth Circuit between summons enforcement actions and grand jury proceedings now requires that the result reached below be reversed, and that the work-product rule be held applicable to such enforcement actions. To hold otherwise, as the court below has done, attributes to the Commissioner of Internal Revenue investigative powers under Section 7602 far broader than those now afforded grand juries. In light of the virtually "unfettered" investigative powers otherwise permitted to grand juries,[11] no policy or other reasons can justify such an anomalous result.

Moreover, the decision reached below is contrary to the principles for application of the work-product rule announced by this Court in *United States* v. *Nobles, supra*. The Court made clear in *Nobles* that the public policies served by the work-product doctrine have

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[11] *E.g.*, United States v. Thompson, 251 U.S. 407, 413-15 (1920); In re Terkeltoub, *supra* at 684.

fundamental importance in criminal as well as civil litigation. The Court emphasized that:

> Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. 422 U.S. at 238 (footnote omitted).

This case shows vividly the necessity of the Court's instructions. The summons here was issued by a special agent in the Service's Criminal Investigation Division, as one of the preliminary steps that may lead to criminal prosecution. In such a situation, there are compelling reasons of policy to permit the taxpayer to consult freely with counsel and to encourage counsel to explore thoroughly all of the client's possible defenses. An unnecessary and unrestricted intrusion into counsel's work product by IRS' investigators chills the attorney's performance of his professional responsibilities and inhibits the preparation of defenses to a possible criminal prosecution. The decision below repudiates the "even more vital" role of the work-product rule in connection with criminal prosecutions. *Id.*

Denial of the protection of the work-product rule in connection with criminal investigations by IRS also raises serious constitutional issues under the Fifth and Sixth Amendments. Counsel's work in investigating and preparing defenses to possible criminal charges is "a vital center in the administration of criminal justice." *In re Terkeltoub, supra* at 684. To protect and assure the privacy essential for those preparations, gov-

ernment investigators are, for example, forbidden to eavesdrop or to plant agents to hear the defense's consultations. *E.g., Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952). Even without a showing of actual prejudice, any such intrusion denies effective assistance of counsel, contrary to the requirements of the Fifth and Sixth Amendments. *Caldwell* v. *United States,* 205 F.2d 879, 881 (D.C. Cir. 1953), *cert. denied,* 349 U.S. 930 (1955). In these and other cases, it has repeatedly been emphasized that an accused "does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." *Coplon* v. *United States, supra* at 757.

The intrusion permitted in this case into the confidentiality of the efforts of Upjohn's counsel is not less serious because it was not surreptitious. Constitutional protection would be a "thin illusion" if the Government could "have for the asking" what it has in other instances sought "by less genteel means." *In re Terkeltoub, supra* at 685. Whatever the method employed, any invasion of the privacy of counsel's work in investigating and preparing defenses to criminal charges threatens fundamental constitutional policies. This case affords the Court an important opportunity to define the scope of application of the Fifth and Sixth Amendments in connection with criminal investigations.

The work-product rule is designed to serve longstanding public policies with their roots in constitutional requirements. The narrow scope of application given to the rule by the Court of Appeals in this case erodes and threatens those important policies. Review by this Court is needed to resolve the conflict among the circuits, to resolve substantial constitutional issues, and to vindicate those policies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 78-1277

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS, *Petitioners-Appellees,* v. THE UPJOHN COMPANY and GERARD THOMAS in his official capacity, *Respondents-Appellants.*	ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed June 28, 1979.

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. The principal question on appeal is whether this Circuit should adopt the "control group" or the broader "subject matter" test as the standard for measuring the scope of the attorney-client privilege in the corporate context. Appellants, Upjohn Company and its in-house General Counsel, appeal from the District Court's order enforcing under 26 U.S.C. §§ 7402(b), 7604(a) (1976) an IRS summons for documents. The General Counsel refused to produce the documents on the grounds that they are protected by company's attorney-client privilege and by the work-product doctrine. District Judge Fox rejected these arguments and enforced the summons. We adopt the "control group" test, affirm in part, reverse in part and remand.

While auditing Upjohn's 1972-73 consolidated federal income tax returns, the IRS learned that since January 1, 1971, Upjohn and its subsidiaries had made payments of approximately $4,400,000 to officials of many of the 136 foreign countries in which Upjohn does business. The company had directed its in-house counsel, along with outside counsel, to conduct an internal investigation of these payments. At the request of Upjohn's top management, officers and employees of the company were urged to respond to counsel's questions candidly and confidentially. The responses were recorded in answers to written questionnaires and in counsel's notes and memoranda describing oral interviews. These are the documents the IRS seeks to obtain in the instant proceeding.

The internal investigation was prompted, at least in part, by Upjohn's concern that the payments had not been reported properly to the Securities and Exchange Commission. The company filed two reports with the SEC disclosing some, but not all, of the details of the payments. The disclosures were voluntary in the hope of lenient treatment by the SEC. These reports to the SEC were made available to the IRS, which then commenced the instant investigation.

The company provided the IRS with details of $700,000 worth of the payments which it conceded might affect its federal income tax liability. The company furnished the IRS considerably less detailed information regarding the other $3,700,000 of questionable payments because the company claims that these payments do not affect its tax liability. Although the company made its employees available for questioning by the IRS, the company refused to permit questions about the $3,700,000 of questionable payments. The IRS claims that the company's limited disclosure has been inadequate to permit an independent evaluation of the possible tax implications of the payments. Accordingly, the IRS summoned from company counsel the documents generated in the course of the internal investigation and now seeks enforcement.

Upjohn claims that the communications to counsel made by all of its employees, including regular and middle management employees as well as top management, are privileged as confidential communications between client and attorney.[1] To the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice, we disagree for the simple reason that the communications were not the "client's."

The attorney-client privilege, as it exists today, is based on two related principles. The first is that it is an intrinsic part and a necessary incident of the attorney-client relationship. The legal profession has an intimate relationship with its clients and an important role in the administration of our system of justice. Privacy is the necessary context of the relationship between the individual and his lawyer. As stated by Dean McCormick:

> Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosure regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.[2]

The second principle is that the privilege "encourage[s] clients to make full disclosure to their attorneys."[3] This policy of

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[1] *See* VIII J. WIGMORE, EVIDENCE, § 2292 at 558 (McNaughton Rev. 1940):

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

[2] McCORMICK, EVIDENCE § 87 at 176 (2d ed. 1972).

[3] Fisher v. United States, 425 U.S. 391, 403 (1976).

promoting full disclosure to counsel serves to implement the notion inherent in the first principle, that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests.

The application of the privilege to corporate "clients" poses a somewhat different problem. Since corporations are inanimate, artificial entities, the attorney-client relationship is conceptually more difficult, and its underlying principles are less obvious. As clients, corporations can communicate to attorneys only through agents. Moreover, corporations, unlike individuals, are organized in such a way that responsibilities, and the information needed to fulfill the responsibilities, are delegated and compartmentalized. Thus, marketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. It is only the senior management, guiding and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole.

Courts have generally recognized that the attorney-client privilege applies to corporations so long as the attorney-client relationship was initiated and pursued by the company's management.[4] Any communication made by top management to the corporation's attorney, which otherwise meets the requirements of the attorney-client privilege, is protected from disclosure.

The difficulty arises when, after the attorney-client relationship has been established by the top management, communications are made to counsel by subordinate corporate agents and employees. Some courts, notably the Seventh and Eighth Circuits, have adopted the position that such communications are privileged if certain conditions are met. The specification of the conditions varies, but the sum and substance are similar: If the agent is in possession of information acquired in the ordinary course of business relating to the subject matter

[4] *E.g.*, Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968).

of his employment, and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged.[5] Under this "subject-matter" approach, the privilege does not cover communication of pre-existing documents prepared for independent business reasons[6] or communications unrelated to the subject matter of the agent's employment.[7] Other courts have adopted a narrower approach which covers only those communications made by the so-called "control group" of the corporation, namely, those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given.[8] It is our opinion that the "subject matter" approach goes too far, and we align ourselves with the courts that have adopted the "control group" analysis. The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use. Corporate counsel should not be the exclusive repository of unpleasant facts. The law should not encourage corporate

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[5] Diversified Industries, Inc. v. Meredith, 574 F.2d 596 (8th Cir. 1977) (*en banc*); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (*per curiam*), *aff'd without opinion by an equally divided Court*, 400 U.S. 348 (1971).

[6] *See, e.g.*, Diversified Industries, *supra* note 5 at 809.

[7] *Id. Cf.* Hickman v. Taylor, 329 U.S. 495, 508 (1947 (". . . the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.")

[8] In re Grand Jury Investigation, —— F.2d —— (No. 78, 2040, 3d Cir. June 1, 1979); Natta v. Hogan, *supra* note 4; In Grand Jury Subpoena Dated December 19, 1978, —— F. Supp. —— (No. M 11-1978, S.D. N.Y. Feb. 21, 1979), *rev'd on other grounds* —— F.2d —— (No. 79-1136, 2d Cir. May 21, 1979). Virginia Electric & Power Co. v. Sun Shipping and Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963); City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa.)., *mandamus denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied* 372 U.S. 943 (1963). *See also* Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977).

managers to shield themselves from information about possibly illegal transactions. Such purposeful ignorance does not serve the interests of moral corporate conduct or the protection of stockholder equity.

In addition, the scope of the attorney-client privilege should be limited to its purpose because the privilege acts as a bar to the discovery of the truth.[9] The "control group" test recognizes that a corporation's decision-makers, like individual clients, must communicate freely and confidentially to counsel. By protecting these communications, the "control group" test promotes consultation with counsel and thereby achieves its objective.[10] At the same time, the "control group" test guards against undue limitation of evidence. The "subject matter" approach enables the corporation's management — via agents — to "communicate" to counsel the details of transactions about which management is only dimly aware and to have these communications protected by the attorney-client privilege. Thus, once management is informed in a general way of transactions posing legal problems, it can order subordinate agents to communicate the full details directly to counsel. Because the "subject matter" test brings these communications within the attorney-client privilege, it tends to encourage this type of indirect communication to counsel. This, in turn, fosters situations in which the *only* record of the full details of a particular transaction is in the hands of corporate counsel and, under the "subject matter" test, undiscoverable. Discovery, then, would have to be directed at the corporate agents who know the details of the transaction rather than at the corporation's management. When the knowledgeable agents are located in several foreign countries, as here, the burden on discovery is severe. We, therefore, decline to accept Up-

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[9] United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir. 1964).

[10] *See generally* Kubak, *The Uneven Application of the Attorney Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339 (1972); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

john's argument because of the broad "zone of silence" it would tend to create.[11]

Upjohn argues, however, that some of the communications in this case were made by members of the "control group." This point is well taken. The record indicates that, in the course of their investigation, Upjohn's counsel interviewed a number of senior corporate officers, including the Chairman of the Board, the Vice Chairman, and the President. These senior officers, and possibly others, are in all likelihood members of the "control group" and their communications to counsel should be privileged.[12] Therefore, we remand the case to the District Court to determine which communications sought by the IRS were made by members of the "control group" and to deny enforcement of the summons with respect to these "control group" communications.[13]

Affirmed in part, reversed in part and remanded.

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[11] Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953, 955 (1956). We recognize that, historically, individual clients' communications with counsel via agents have been deemed privileged. *E.g.*, In re Aspinwall, 2 F. Cas. No. 591 (S.D. N.Y. 1874). We believe, however, that this principle should be limited to agents who, at the client's request, communicate *facts known to the client*. *See e.g.*, Reid v. Langlois, 41 Eng. Rep. 1408 (1849); *see generally* MORGAN, BASIC PROBLEMS OF EVIDENCE 100-01 (1954); Simon, *The Attorney-Client Privilege*, *supra*, at 963-64.

[12] The corporation's voluntary disclosures to the SEC amount to a waiver of the privilege only with respect to the facts actually disclosed. United States v. Cote, 456 F.2d 142 (8th Cir. 1972); United States v. Judson, 322 F.2d 460, 461 (9th Cir. 1963); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied* 371 U.S. 951 (1963); IBM v. Sperry Rand Corp., 44 F.R.D. 10 (D. Del. 1968). *See generally* MCCORMICK, EVIDENCE § 93 (2d ed. 1972).

[13] Upjohn's other arguments that the work-product doctrine and principles of relevancy shield it from disclosure are not well founded. The work-product doctrine of *Hickman* v. *Taylor*, *supra* note 7, and FED. R. CIV. P. 26(b)(3) is not applicable to administrative summonses issued under 26 U.S.C. § 7602. The IRS simply must show that the inquiry is relevant to a good faith investigation conducted pursuant to a legitimate purpose, that the information sought is not in the IRS' possession and that proper administrative procedures have been followed. United States v. Powell, 379 U.S. 48, 57-58 (1964). *See also* United States v. Coopers & Lybrand, 550 F.2d

615 (10th Cir. 1977); United States v. Davey, 543 F.2d 996 (2d Cir. 1976); United States v. Matras, 487 F.2d 1271 (8th Cir. 1973); United States v. Theodore, 479 F.2d 749 (4th Cir. 1973); United States v. McKay, 372 F.2d 174 (5th Cir. 1967).

There is no reason why the IRS should be required to take on faith Upjohn's assurances that $3,700,000 in questionable payments had no tax consequences, especially in view of the company's admission that $700,000 in questionable payments did affect its tax returns. The fact that the IRS investigation is focused on the years 1972-74 does not mean that records after 1974 might not shed light on the earlier years' returns. Moreover, the IRS is not precluded from expanding its investigation into 1975 and later years should the facts warrant. The inquiry, therefore, is relevant to a legitimate investigation of Upjohn's tax liability. Upjohn has not argued that the IRS has acted in bad faith, that the proper administrative procedures have not been followed, or that the information sought is already in the hands of the IRS. Accordingly, the IRS is entitled to have its summons enforced as to all non-privileged material.

Portions of the Petition which also appear in the Appendix have been removed to avoid duplication

Portions of the Petition which also appear in the separately printed Appendix which follows have been removed to avoid duplication

APPENDIX B

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. K77-7 Misc. CA 4

UNITED STATES OF AMERICA and DAVID E. NOWAK, Special Agent, Internal Revenue Service, *Petitioners*

vs.

UPJOHN COMPANY and GERARD THOMAS, Vice President and Secretary, *Respondents*

Report and Recommendation of Magistrate

[Filed: February 23, 1978]

This is a proceeding to enforce an Internal Revenue Service summons issued on November 23, 1976 by a special agent of the Internal Revenue Service to the Upjohn Company (herein called the Company) and Gerard Thomas, its Vice President and Secretary.

The summons was issued pursuant to section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602, which provides:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> > "(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Following the respondents' refusal to comply with the terms of the summons, a petition to enforce the summons was filed in this court pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a).[1]

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[1] Section 7402(b) provides:

"(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Section 7604(a) provides:

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

On August 31, 1977, an order to show cause was entered directing the Company and Gerard Thomas to show cause why they should not be compelled to obey the summons. A hearing was scheduled for September 26, 1977, which was adjourned to October 12, 1977 by agreement of counsel. A hearing was held before the undersigned on the adjourned date.

The summons directed the Company and Mr. Thomas to appear before James M. Rogowski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the Company for the years 1972, 1973, and 1974, and also to produce for examination the following records of the Company:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."

The Company and Mr. Thomas refused to produce the records referred to in the summons on the ground that the records were shielded from disclosure by the attorney-client privilege or the work product doctrine, and that the standards required for judicial enforcement of the summons had not been met.

Findings of Fact

The Company is a multinational corporation engaged in the manufacture and marketing of pharmaceuticals. It does business in approximately 150 foreign countries both through foreign subsidiaries and foreign branches of United States subsidiaries. Its worldwide sales in 1975 were over 890 million dollars (Petitioner Exhibit 3, Tr. 63). The Company files a consolidated federal income tax return with some of its subsidiaries, but some of its foreign subsidiaries or affiliates are not included in that return. (Tr. 11)

Mr. Thomas is a Vice President, Secretary, and General Counsel of the Company. He is also a member of its Board of Directors and serves as an officer of some of the subsidiaries. (Tr. 62, 77)

In January 1976, the Company's outside auditors, in the course of auditing one of the Company's foreign subsidiaries (Upjohn International Inc.), discovered that payments were being made by the foreign subsidiary to government employees, or to third parties believed to be acting as intermediaries for government employees, for the purpose of securing government business. (Petitioner Exhibit 3, Tr. 78-79). The petitioner has referred to these payments as bribes or kickbacks paid directly or indirectly to foreign government employees to influence their action. Mr. Thomas in his testimony described them as "payments made by or on behalf of the Company or its subsidiaries, which were made to third parties or to Government employees under circumstances indicating that they might be for improper purposes." (Tr. 59-60). They will be referred to hereafter as the "questionable payments." From 1971 through 1975 these payments were in excess of four million dollars. (Petitioner Exhibit 4). The fact of such payments was apparently known by certain inside directors and officers associated with the international operations of the Company. (Petitioner Exhibit 3).

The discovery of the questionable payments was reported by the auditors to Mr. Thomas and other individuals in the Company in January 1976. (Tr. 79) Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the Company with respect to the payments. (Tr. 60-61, 79). As a part of the investigation, Mr. Thomas and outside counsel prepared a written questionnaire to be mailed by the Chairman of the Board to 53 foreign general and area managers of the Company. The questionnaire elicited information regarding questionable payments and directed the addressee to return the form to Mr. Thomas. (Tr. 66, Respondents' Exhibits 2 and 3.)

In addition, Mr. Thomas interviewed by telephone or in person all persons to whom a questionnaire had been sent. He and two outside counsel also interviewed other persons who had not been mailed questionnaires. A total of 86 persons were interviewed, some of whom were no longer employees of the Company. (Tr. 64-66, 95-97, Respondents' Exhibit 1). The interviewer made written notes of the interviews. Mr. Thomas described his notes of the interviews as follows:

> "My notes would contain what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere. They were more than just a verbatim report of my conversation with the—a report of my conversation in the interviews." (Tr. 65)

The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel. (Tr. 65-66, 69-70)

Following Mr. Thomas' initial investigation of the questionable payments, the Company, on March 26, 1976, made a preliminary report of such payments to the Securities and Exchange Commission (SEC) on its Form 8-K. This report disclosed, based on Mr. Thomas' questionnaires and interviews, that the Company since January 1, 1971 had made questionable payments totalling $2,710,000 in 22 of the 136 countries served by the Company. The report to the SEC stated that the Company's investigation was still in progress and that further investigation would be furnished when the investigation was concluded. At the time the report was filed Mr. Thomas was aware that other companies were making similar disclosures and that the SEC had indicated a policy of more lenient treatment of corporations which voluntarily disclosed the type of payments here involved. (Petitioner Exhibit 3, Tr. 81-84). At the time of the disclosure to the SEC, the Company agreed to furnish the SEC with any additional data it might request with respect to the questionable payments. (Tr. 103-104)

On July 26, 1976, the Company filed with the SEC an amendment to its Form 8-K, in which it reported that responses, oral or written, had been received to all questionnaires, that additional interviews had been conducted, and that the total of questionable payments was in excess of four million dollars. (Petitioner Exhibit 4, Tr. 84)

Contemporaneously with the filing of the SEC Form 8-K in March 1976 and the amendment of Form 8-K in July 1976, the Company sent copies of those forms to the Internal Revenue Service. (Tr. 69, 84).

Prior to the filing of the 8-K report with the SEC in March 1976, the IRS had been conducting an audit of the

Company's 1972 and 1973 consolidated federal income tax returns. That audit had almost been concluded when the IRS received a copy of the SEC 8-K report (Petitioner Exhibit 1). As a result the audit was not closed. The matter was referred to the Revenue Service's Intelligence Division, which, in a joint investigation with Revenue Agents, undertook an investigation for the years 1972, 1973, and 1974. (Tr. 29, 36-38)

The Company has furnished two schedules to IRS regarding the questionable payments. One schedule is entitled "Summary of Company Payments By Year (Companies Listed Are Those Companies with U. S. Tax Implications Only)." The schedule purports to list the date, the amount, the company making the payment, and the country in which the payment was made from 1971 to early 1976. The Company listed on this schedule only those payments which it believed had an effect on its consolidated federal income tax returns. The payments shown total approximately $700,000. (Tr. 29-33)

The second schedule is less detailed and purports to be a country-by-country summary of payments made in connection with the Company's foreign operations which the Company claims do not affect its consolidated federal income tax returns. These payments total approximately $3,700,000. (Tr. 33-34).[2] The Company also furnished IRS with source documentation underlying the schedules, such as cancelled checks, vouchers, invoices, advices, etc., but the IRS cliams it has not been furnished with sufficient data to enable it to determine whether there are more questionable payments than those shown in the schedules and whether the persons shown as ultimate recipients are in fact such. (Tr. 19-21, 33-35)

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[2] The schedules were not introduced as exhibits but copies were furnished to me for my *in camera* inspection. It is not clear from the record whether these are the same schedules which the Company furnished to IRS, but for present purposes I am assuming that they are the same.

The Company has no objection to inteviews and has permitted interviews by the IRS of Company employees involved in making questionable payments, but will not permit questions as to transactions which the Company has determined do not affect its consolidated federal income tax returns. (Tr. 46-48, 66-67). The Company has not agreed to bring any of its employees in foreign countries to the United States for interviews. (Tr. 104-105)

The Attorney-Client Privilege

The respondents claim that disclosure of the summoned material is shielded from disclosure by the attorney-client privilege. An oft-quoted definition is the one set forth in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 358.

Professor Wigmore defines it as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the pro-

tection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

There is no question that the attorney-client privilege extends to corporations, *Radiant Burners, Inc.* v. *American Gas Association,* 320 F.2d 314 (7th Cir. 1963), and thus may be invoked by the Company here. Nor is there any question that "house counsel," such as Mr. Thomas when acting as a legal advisor to the Company, is within the purview of the attorney-client privilege under the same circumstances as "outside counsel." *Natta* v. *Hogan,* 392 F. 2d 686 (10th Cir. 1968).

As with all privileges, the person claiming the privilege has the burden of establishing all its essential elements. *In re Horowitz,* 482 F.2d 72 (2nd Cir. 1973), cert. den. 414 U.S. 867 (1973). The Sixth Circuit has observed that the privilege is designed to enable a client to confide in his attorney, secure in the assurance that there will be no disclosure, but that the privilege does not envelope everything arising from the existence of an attorney-client relationship. *United States* v. *Goldfarb,* 328 F.2d 280, 282 (6th Cir. 1964):

> "It is to be remembered that the attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception should not be extended to accomplish more than its purpose. As Dean Wigmore said in his oft-quoted statement: 'It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.' 8 Wigmore, Evidence § 2291, at 554 (McNaughton rev. 1961). The judicial decisions have echoed this need for a restrictive interpretation and application of the privilege. Prichard v. United States, 181

F.2d 326 (C.A. 6); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass.) *Id.* at 282.

The privilege is at best a difficult one to apply. It becomes even more difficult when, as here, the client is a corporation. This stems from the fact that a corporation, being an artificial legal entity, can only act through its agents or employees. Since the attorney-client privilege applies only to communications by or to a "client," and since a corporation can communicate only through its employees or agents, the question arises as to the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege.

The landmark case of *Hickman* v. *Taylor,* 329 U.S. 495 (1947) dealt inferentially with this problem in the context of a partnership. The Court concluded that no attorney-client privilege could be claimed in that case by the defendant partnership for statements taken by the defendant's attorney from the crew members of the defendant's vessel, which was involved in an accident. The Court treated the employee crew members simply as witnesses and outside the scope of the privilege.

The problem was probably first met squarely and discussed in depth in *Philadelphia* v. *Westinghouse Electric Corp.,* 210 F. Supp. 483 (E.D. Pa. 1962), which involved the defendant's claim of privilege with respect to information acquired by its general counsel from an employee in the course of the counsel's investigation of facts relating to a pending indictment of the defendant. The court adopted the so-called "control group" test for determining whether the communication of a corporate employee or agent could qualify as being the communication of the corporate client for the purpose of a corporation's invoking the attorney-client privilege. The court stated:

"Now, in cases where an employee of a corporation in an executive or managerial position communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation, the question frequently arises: When he does so, is the corporation seeking the advice of the attorney? In other words, was he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged although it may be within the ambit of the 'work product' principle; and it is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case." *Id.* at 485.

The court also stated that the rank in the corporation of the employee making the communication is not a satisfactory guide in determining whether the privilege is applicable because such terms as manager, executive, or officer are not clearly defined terms. *Id.* at 485. The court stated the proper approach as follows:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substan-

> tial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice." *Id.* at 485.

The court went on to conclude that the communications made by the employee were not within the attorney-client privilege, stating:

> "It is obvious that the matter as to which the witnesses in this case made the disclosures was a matter of overwhelming importance to the corporation, and that even a department or division head or an employee on a similar managerial level would hardly be given any substantial role in making that decision. It was a matter which, of course, the corporation knew made it probable that very heavy claims for damages would be asserted against it and a decision of that kind could have been made only by the very highest authority." *Id.* at 485-6.

In essence the court held that if the employee making the communication, of whatever rank he might be, was in a position to control or even to take a substantial part in a decision about any action which the corporation might take upon the resulting advice of the attorney, or if he was an authorized member of a body or group which had that authority, then in effect he was or personified the corporation when making the disclosure, and the privilege would apply, while in all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

The control group test has been followed in many decisions. See, for example, *Natta* v. *Hogan,* 392 F.2d 686 (10th Cir. 1968); *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.,* 68 F.R.D. 397 (E.D. Va. 1975); *United States* v. *International Business Machines Corp.,* 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Burlington Industries* v. *Exxon Corporation,* 65 F.R.D. 26 (D. Md. 1974); *Honeywell Inc.* v. *Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D. Pa. 1970); *Congoleum Industries Inc.* v. *G.A.F. Corp,* 49 F.R.D. 82 (E.D. Pa. 1969); *Garrison* v. *General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963).

I am aware of *Harper & Row Publishers, Inc.* v. *Decker,* 423 F.2d 487 (7th Cir. 1970), affirmed *per curiam* by an equally divided court, 400 U.S. 348 (1971), reh. den., 401 950 (1971), cited in respondents' brief, which held that the control group test is not wholly adequate. The court held that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. It would appear that the *Harper & Row* formula would exclude virtually nothing from its sweep and flies in the face of the well-established principle that the privilege "should be strictly confined with the narrowest possible limits consistent with the logic of its principle." *United States* v. *Goldfarb,* supra.

It would also appear to open the door to the danger envisioned by the Supreme Court in *Hickman* v. *Taylor,* supra:

> "Thus in a suit by an injured employee against a railroad or in a suit by an insured person against an insurance company the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect

after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents." 329 U.S. at 506.

In view of the overwhelming acceptance of the control group test, I have concluded that it should be followed in this case.[3] Thus the fact that the persons interviewed by Mr. Thomas were branch managers or area managers is not determinative of whether the privilege is applicable. The important question is whether they were in a position to control or to take a substantial part in a decision about any action the Company might take upon the advice of Mr. Thomas, or whether they were merely giving information to Mr. Thomas to enable him to advise those in the corporation having the authority to act or refrain from acting on his advice. It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board, Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like. (Tr. 79-80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaires and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the

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[3] It is speculative as to how much, if any, of the information Mr. Thomas obtained from the Company employees would be protected even under the *Harper & Row* formula, since it requires that the employees' communications deal with subject matter within the duties of their employment. Mr. Thomas testified that the person interviewed may himself have been a participant in the payments or he may have been reporting on what he had learned, through investigation, about the activities of others. (Tr. 93-94)

Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege.

It may also be noted that the attorney-client privilege may be lost or waived by disclosing to others what has earlier been confided to an attorney. See *United States* v. *Cote*, 456 F. 2d 142 (8th Cir. 1972) (filing of amended tax returns which reflected accountant's workpapers to which privilege had attached effectively waived the privilege not only as to the transmitted data but also as to the details underlying that information); *United States* v. *Schoeberlein*, 335 F. Supp. 1048 (D. Md. 1971). (Work papers of accountant-attorney were no longer privileged after being used as a basis for a Federal Communication Commission license application as well as for a tax return); *B & C Trucking Co.* v. *Holmes & Narver, Inc.*, 39 F.R.D. 317 (D. Haw. 1966). (Disclosure of internal communications between contractor and its attorney to Atomic Energy Commission destroyed or waived any attorney-client privilege.) The doctrine of waiver was referred to in *Duplan Corporation* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146 (D. S.C. 1975) as follows:

> "A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made *with limitations* of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived.
>
> "Plaintiff's argument that waiver requires an intentional relinquishment or abandonment of a known right

has a familiar ring with regard to general contract law, but waiver, as applied to the particular subject of attorney-client privilege, may be made by implication:

> "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that *his privilege shall cease whether he intended that result or not.* 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961." *Id.* at 1162. (Emphasis in original)

In the present case, the Company made disclosures to the SEC with respect to the questionable payments in its 8-K report of March 26, 1976, and its amended 8-K report of July 26, 1976. Furthermore, the Company agreed to furnish the SEC with any additional data it might request with respect to such payments. (Tr. 103-104) Copies of the SEC reports and related data was also furnished to the IRS. Having disclosed some data with respect to questionable payments, it now seeks to hold back other data relating to the same matter. Under the circumstances, the Company should be deemed to have waived the attorney-client privilege with respect to the same matter, if indeed it ever existed. As stated by the court in *Burlington Industries* v. *Exxon Corporation,* supra:

> "Nevertheless, the court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961). Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." 65 F.R.D. at 46.

Mindful of the admonition requiring "a restrictive interpretation and application of the privilege," *United States* v. *Goldfarb,* supra, I find that the respondents have not sustained their burden of proving that the summoned material is shielded from disclosure by the attorney-client privilege, and that the privilege is not applicable here.

The Work Product Doctrine

The respondents claim that disclosure of the summoned material is also shielded from disclosure by the work product doctrine. This doctrine had its genesis in *Hickman* v. *Taylor,* 329 U.S. 495 (1947). The Court there held that while private memoranda, written statements of witnesses, and mental impressions or personal recollections prepared or formed by an attorney in the course of his legal duties for his own use in prosecuting his client's case and contained in his files or mind fall outside the scope of the attorney-client privilege, and hence are neither protected from discovery on that basis nor protected from disclosure because the subject matter is "privileged" or "irrelevant" as those concepts are used in the federal rules, nevertheless they are protected from discovery as the "work product" of the attorney, in the absence of any showing, of necessity or any indication or claim that denial of discovery would unduly prejudice the preparation of the inquiring party's case or cause him any hardship or injustice.

The respondents argue that counsel's notes of the interviews constitute material squarely covered by the attorney work product doctrine, and that so do the responses to the questionnaires because the information thus obtained is the product of the work of the Company's counsel.[4]

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[4] To the extent that the responses to the questionnaires simply reflect the answers of the employee, they would appear to be no different than the written statement of a witness which records the mental impressions and observations of the witness, rather than

There is, at the outset, a serious question as to whether the work product doctrine is even applicable in a summons enforcement proceeding. In *United States* v. *McKay,* 372 F.2d 174 (5th Cir. 1967), which also involved the enforcement of an Internal Revenue Service summons under 26 USC § 7604(a), the court held that the relevancy of the work product rule to such a proceeding "may well be doubted." The court stated:

> "We think the power of the Commissioner of Internal Revenue to investigate the records and affairs of taxpayers is greater than that of a party in civil litigation. His power has been characterized by this court as an inquisitorial power, analogous to that of the grand jury and one which should be liberally construed. Falsone v. United States, 5 Cir. 1953, 205 F.2d 734, 742 cert. den. 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375. In such context, the criteria of relevancy and materiality have broader connotations than in the context of trial evidence. Schwimmer v. United States, 8 Cir. 1956, 232 F.2d 855, 862, cert. den. 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52. As was said in Bolich v. Rubel, 2 Cir. 1933, 67 F.2d 894, 895, these inquisitorial powers are justified 'because all the facts are in the taxpayer's hands.' Accordingly, the relevancy of the work product privilege enunciated in the *Hickman* case to a proceeding for the enforcement of the Commissioner's summons may well be doubted." *Id.* at 176.

However, even if the work product doctrine is deemed applicable to this type of proceeding, the doctrine is not a privilege, and discovery may still be had upon a showing of "substantial need" and an inability "without undue hardship" to obtain the information by other means. Rule 26(b)

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those of the attorney. In such case, the response would not properly be considered the work product of the attorney. See *Scourtes* v. *Fred W. Albrecht Grocery Co.,* 15 F.R.D. 55, 58 (N.D. Ohio 1953).

(3), Federal Rules of Civil Procedure. *Hickman* v. *Taylor*, supra, 329 U.S. at 511; *Burlington Industries* v. *Exxon Corporation*, supra, 65 F.R.D. at 43. Thus in *United States* v. *Brown*, 478 F.2d 1038 (7th Cir. 1973), the court, although holding that the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue Service summons, nevertheless concluded that a three-page memorandum prepared by an attorney summarizing notes and legal judgments made by the attorney at a meeting involving a discussion of the tax consequences of a client's potential business transaction was not protected from discovery by the attorney's work product doctrine.

The court stated:

> "The Supreme Court has also noted the strong Congressional evidence of intent that the Commissioner of Internal Revenue not be impeded in his investigation of taxpayers:
>
> > 'Section 7601 of the 1954 Code, 26 U.S.C. § 7601, directs the Secretary or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed .... and inquire after and concerning" all persons "who may be liable to pay any internal revenue tax." The section thus flatly imposes upon the Secretary the duty to canvass and to inquire.' Donaldson v. United States, 400 U.S. 517, 523, 91 S.Ct. 534, 539, 27 L.Ed.2d 580 (1971).
>
> "We think the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons. *The strong public interest as expressed by Congress in enforcement of the Internal Revenue Act may, however, be relevant in considering the degree of necessity which need be shown prior to the enforcement of an order to produce.*" Id. at 1040-41 (Emphasis supplied.)

In the present case, respondents claim that no necessity exists for allowing disclosure of the responses to the questionnaires or to counsel's notes of the interviews because the respondents have already disclosed ample information both to the IRS and SEC, and because the IRS has already interviewed many of the Company employees. However, the fact is that the Company has refused to allow any of its employees to be interviewed as to any transactions which it has determined for itself have no impact on the Company's federal tax return. Nor has it been willing to disclose details of any transactions for which it has reached the same conclusion. (Tr. 46-48, 66-67). Thus, the Company has relegated to itself the determination of what is or is not relevant to the investigation of the Revenue Service. The record demonstrates that the Company has made questionable payments in excess of four million dollars. It concedes that approximately $700,000 of those payments affect its consolidated federal tax return. As to the balance of payments, the Company insists that the Revenue Service must accept the Company's conclusion that those payments have no effect on its tax return. (Tr. 33-35) Special Agent Novak testified that instead of accepting the summary of the Company's investigation at face value, he wishes to obtain additional information, such as verification of the recipients of the payments, and to check whether there may have been payments which were not recorded on the Company's books. (Tr. 14, 51-52) Moreover, its is not inconceivable that a payment which the Company claims has no impact on its domestic tax return may upon investigation disclose the contrary.

The necessity for compelling disclosure in this case is also indicated by the fact that the persons interviewed are beyond the jurisdiction of the court and thus not subject to compulsory process. Even if they were made available

for interviews,[5] it is not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments which might have been made in violation of local laws. Moreover, where interviews have in fact been permitted, the scope of the inquiry has been limited to what the Company's counsel deemed appropriate. (Tr. 46-48) In *Hickman* v. *Taylor,* supra, the Court stated that "production [of work product] might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S. at 511. Similarly, in *Burlington Industries* v. *Exxon Corporation,* supra, the court stated that the factors to be considered in deciding whether to compel disclosure are "(1) the importance of the information sought and (2) the difficulty the party seeking discovery will face in obtaining substantially equivalent information from other sources if discovery is denied." 65 F.R.D. at 43.

Cf. *Southern Railway Company* v. *Lanham,* 403 F.2d 119, 128 (5th Cir. 1969), reh. den. 408 F.2d 348 (1969) (employees who may be expected to be somewhat reluctant to answer fully questions which might have an adverse effect on their employer); *McDonald* v. *Prowdley,* 38 F.R.D. 1 (W.D. Mich. 1965) (unavailability of witness or difficulty of access to a witness); *Wilson* v. *David,* 21 F.R.D. 217, 221-2 (W.D. Mich. 1957) (witness residing outside the jurisdiction of the court).[6]

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[5] Although the Company has said it will make its employees available for interviews, it has not agreed to bring them to the United States for this purpose. (Tr. 104-105)

[6] These cases involved the disclosure of statements of employees under Rule 34 of the Federal Rules of Civil Procedure upon a showing of "good cause."

I find that the record establishes ample necessity for compelling disclosure of the summoned material in this case, and that the work product doctrine does not shield the material from such disclosure.

The Standards of Enforcement of the Summons

The respondents claim than the standards necessary for judicial enforcement of an Internal Revenue summons as set forth in *United States* v. *Powell,* 379 U.S. 48 (1964) were not complied with. In *Powell,* the court stated:

> "He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . ." *Id.* at 57.

The Court also held that the burden of showing an abuse of the court's process is on the taxpayer. *Id.* at 58.

The respondents do not claim that the administrative steps required by the Code have not been followed. They do claim, however, that the first three requirements enumerated in the quotation from *Powell* have not been satisfied.

The claim that the summons was not issued for a legitimate purpose is clearly without merit. Respondents assert that the summons was issued solely for the purpose of a criminal prosecution, but this assertion is not substantiated by the record. On the contrary, the record establishes that no recommendation for prosecution had been made to the Department of Justice. It also established that the investigation was primarily a civil one and that no determination had been made as to whether the Company or anyone else should be prosecuted, although the possibility of criminal violation is always inherent in any such investigation. (Tr.

14-16, 37-38) In this connection, the Supreme Court in *Donaldson* v. *United States*, 400 U.S. 517 (1971) stated:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. The regulations are positive. Treas. Regs. § 301.7602-1(c)(4), 26 CFR § 301.7602-1(c)(4). The underlying statutes are just as authoritative. Section 6659(a)(2) of the Code defines the term 'tax' as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615(a)-(c), which, by its vey language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. See *Mathis* v. *United States*, 391 U.S. 1, 4 (1968). To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. See *United States* v. *Kordel*, 397 U.S. 1, 11 (1970).
>
> "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. *Id.* at 535-6.

Nor do I find anything in the record to justify the assertion that the summons was not issued in good faith. At most, the summons might be classified as having a dual purpose, which clearly would not render it improper. In

United States v. *Held*, 435 F.2d 1361 (6th Cir. 1970), the court stated:

> "Even if the primary purpose of the summons was to further the criminal tax investigation, we believe the secondary purpose of determining appellant's civil tax liability would support the validity of the summons . . . ."
>
> "It is well settled that a § 7602 summons issued for an authorized purpose is entitled to enforcement even though it may produce evidence of criminal conduct on the part of the taxpayer. (Citations omitted)
>
> "Enforcement of the summons is not precluded by the possibility that it eventually might lead to a criminal prosecution." *Id.* at 1364-5.

See also *United States* v. *Haddad*, 527 F.2d 537 (6th Cir. 1975); *United States* v. *Weingarden*, 473 F.2d 454 (6th Cir. 1973).

Nor is there merit in the respondents' claim that the inquiry is not relevant to its purpose. In this connection, Special Agent Nowak testified:

> "Q. Why do you feel that you should have these documents, if I may add, rather than take the Upjohn Company's assurance as to what the relevance of those documents?
>
> "A. Well, I feel that those files may contain evidence that would indicate that there is in fact a tax implication involved in payments which the Company has alleged have no U.S. tax implication. These files may provide leads or other evidence that would have a relationship to those payments that the Company does admit have a U.S. tax implication.
>
> "I believe that it would—if it seved no other purpose, it would help me corroborate the Company's position

that there is no tax impact, if that is what the facts would show upon my investigation of the files.

"Q. So while it may be a conclusion that the Court has to draw, in your view the summoned documents were, at the time summoned and are today, necessary to your continuing investigation, is that correct.

"A. Yes, sir." (Tr. 14)

Respondents in their brief point to the fact that Agent Nowak used the word "may" in explaining what he was seeking, that is, evidence that "may" indicate tax implications or "may" provide leads to such evidence. It is noted that this is no less than the applicable statute, 26 USC § 7602, requires. The statute authorizes the Secretary to "examine any books, papers, records, or other data which *may* be relevant or material to such inquiry."

The Supreme Court has recognized the strong Congressional intent that the Revenue Service not be hindered in its investigation of taxpayers, and that the applicable statute "flatly imposes upon the Secretary the duty to canvass and to inquire." *Donaldson* v. *United States,* supra, 400 U.S. at 523. The test of relevancy was stated in *Foster* v. *United States,* 265 F.2d 183 (2nd Cir. 1959), cert. den. 360 U.S. 912 (1959), as follows:

"The test, we think, is essentially the same as that for materiality with respect to grand jury investigations. (Citations omitted) It is whether the inspection sought 'might have thrown light upon' the correctness of the taxpayer's returns."

See also *United States* v. *Egenberg,* 443 F.2d 512, 515 (3rd Cir. 1971); *United States* v. *Harrington,* 388 F.2d 520, 523 (2nd Cir. 1968); *United States* v. *Auker,* 325 F. Supp. 857 (S.D. N.Y. 1971).

In *United States* v. *Auker,* supra, the summons sought the production of the taxpayer's corporate minutes for several taxable years. The taxpayer (Standard Oil Company of New Jersey) argued that since not everything in the corporate minutes was relevant, it was not required to disclose all of its minutes. Therefore, it decided it "would make available for inspection all minutes which might have a bearing on the determination of Jersey's income tax liability." Thus, the taxpayer, like the Company here, undertook to decide for itself what was relevant, or more particularly what would affect or have a bearing on its tax liability. In rejecting this position, the court stated:

> "The accountants, to be sure they see what is germane to their task, look at minutes that turn out not to be germane. They do not accept the views of others as to what they ought to examine, and the company does not expect them to do so. This makes sense for them. It makes equally good sense, *mutatis mutandis,* for the agents of the IRS.
>
> "When we turn to the governing precedents, we discover what is not altogether extraordinary—that the dictates of good sense are in line with the law's commands. The cases show that the statutory provision for the examination of papers that '*may* be relevant or material'—properly viewed as a prediction about things yet unseen, not as judgment about materials presented or offered for 'rulings'—has to mean what it quite simply says: that the demand may extend to documents that 'might' throw light upon subjects under legitimate inquiry. . . . The agents of the IRS cannot and they need not guarantee that everything they wish to see *will* be relevant or material to their inquiries any more than Jersey's accountants can do for theirs." 325 F.Supp. at 861-2.

Respondents also complain of the fact that the summons shows on its face that it relates to the tax liability of the

Company for the years 1972, 1973, and 1974; yet the summons seeks information regarding questionable payments "since January 1, 1971." Special Agent Nowak explained the reason for the time span as follows:

> "Q. Mr. Nowak, you have been sworn, of course. Some comment has been made about the years '71 and '75 with respect to this Summons. Would you briefly explain the relevance and necessity for those documents and the other information sought with respect to your investigation, which is currently for '72 through '74?
>
> "A. Well, in relation to 1975, the fact that there has been a Schedule M adjustment indicates that there is an item that the Internal Revenue Service ought to check to make sure the adjustment has been treated properly. And, in addition, the Government's position, the Internal Revenue Service's position has always been clearly stated that while the investigation covered the years 1972 through 1974 we were not precluded in opening up going into the 1975 were we to find indications of possible criminal or civil ramifications in these payments. And in regard—we could also have the option of going back to 1971, if we wanted to. Another possible relevancy for that material, especially 1971, is the possibility of transactions occurring in one year and not being recorded on the books and records of the Company in that year, but for various reasons, through error or otherwise being recorded in another year, so we would have to make sure that transactions were properly reflected in the year that they occurred." (Tr. 51-52)

The limited disclosures which the Company voluntarily made to the SEC and the IRS covered the period "since January 1, 1971." Under the circumstances, it was reasonable for the Revenue Service to request information for a period at least as long as that covered by the Company's disclosures.

Respondents also point to the fact that on November 28, 1977, the Internal Revenue Service issued a Revenue Ruling which, they claim, holds that illegal bribes and kickbacks made by a foreign subsidiary properly reduce the earnings and profits of that subsidiary, and, in effect, do not have an impact on the United States tax return of the parent. Rev. Rul. 77-442, 1977-48 I.R.B. 10. This, of course, does not answer the basic question, whether the respondents can unilaterally decide for themselves whether the questionable payments fall within the ambit of the ruling. Moreover, the Company's own tax expert, David S. Creamer, who is the Manager of the Company's Corporate Tax Planning Unit, candidly conceded that there are various situations in which the arrangements between a domestic parent and a controlled foreign corporation could have an impact on the parent's federal income tax return. (Tr. 141-143)[7] The Revenue Service should be able to determine for itself whether any of the questionable payments were made under circumstances or arrangements which would trigger domestic tax consequences.

The respondents also claim that the summons should not be enforced because the "information sought is . . . already within the Commissioner's possession." *United States* v. *Powell*, supra, 379 U.S. at 57. Respondents misconstrue the quoted words, which obviously refer to the data sought by the summons itself. Clearly, respondents' failure to provide the data specified in the summons is the reason this enforcement proceeding was instituted. The information which is "already within the Commissioner's possession" is simply that which the respondents have unilaterally chosen to reveal to him. As set forth above, the Commissioner

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[7] One example cited was where a controlled foreign company creates an off-book account, not shown on its records, from which it disburses funds in the foreign country for the benefit of the American parent. This, the witness testified, would have an impact on the domestic tax return of the parent as a constructive dividend. (Tr. 141)

desires additional information, and he is not bound to accept the respondents' determination of relevancy at face value.

Finally, respondents claim in their brief that the summons here constitutes nothing more than a "fishing expedition." If this be so, this claim was fully answered in *United States* v. *Giardano,* 419 F.2d 564, 568 (8th Cir. 1970):

> "Taxpayer in his brief characterized the Government's efforts as a 'fishing expedition.' If so, the Secretary or his delegate has been specifically licensed to fish by § 7602."

For the reasons herein stated, I find that the summoned material is not shielded from disclosure by the attorney-client privilege, nor by the work product doctrine, and that the standards required for judicial enforcement of the summons have been met. Therefore, I respectfully recommend that an order be entered compelling the respondents to comply with its terms.

/s/ STEPHEN W. KARR
Stephen W. Karr, United States Magistrate

Dated: February 23, 1978

APPENDIX C

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners,

v.

UPJOHN COMPANY and GERARD THOMAS, Vice President
and Secretary,
Respondents.

Order

Filed April 23, 1978

Magistrate Karr submitted to me his Report and Recommendation in the above matter on February 23, 1978. I promptly read the report and the briefs submitted by the parties and agreed with the Report and Recommendation.

The February 28, 1978 issue of U.S. Law Week, which arrived on March 3, 1978, reports on a recent decision of the Eighth Circuit Court of Appeals dealing with the attorney/client privilege in a factual situation somewhat similar to the Upjohn case. That case is *Diversified Industries Inc.* v. *Meredith*, 46 L.W. 2435, apparently decided on February 15, 1978. A copy of the decision was attached to a letter-amendment to the Magistrate's Report and Recommendation submitted on March 7, 1978.

I have carefully read and considered *Diversified Industries, Inc.* v. *Meredith,* supra, cited by Magistrate Karr in his letter-amendment of March 7, 1978, and his further

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letter-amendment of March 13, 1978. I find the Magistrate's Report and Recommendation is an excellent opinion and is the prevailing law. Therefore, I hereby accept as the opinion of this court the Magistrate's Report and Recommendation.

IT IS SO ORDERED.

Dated: April 28, 1978.

/s/ NOEL P. FOX
Chief Judge, U.S. District Court
Western District of Michigan

CERTIFIED AS A TRUE COPY
Gerald H. Liefer, Clerk

BY /s/ MARY HAMTAK
Deputy Clerk

April 28, 1978.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION No. K77-7 Misc.

UNITED STATES OF AMERICA and DAVID E. NOWAK,
Special Agent, Internal Revenue Service,
Petitioners,

v.

THE UPJOHN COMPANY and GERARD THOMAS, Vice President,
Secretary and General Counsel,
Respondents.

Order and Final Judgment

This Court having considered the record in this case as developed before the Magistrate, and having issued an order on April 28, 1978, accepting the Magistrate's Report and Recommendation that the summons be enforced, it is now therefore

ORDERED that the respondents, The Upjohn Corporation and Gerard Thomas, on May *30th*, 1978, at 9:00 a.m. at the office of the Intelligence Division, Internal Revenue Service, Room B-47, Federal Building, 410 W. Michigan Avenue, Kalamazoo, Michigan, obey the summons served upon them on November 23, 1976, and each and every requirement thereof, by testifying and producing all of the books, records, papers and other data set forth in the summons

and referred to in the Petition to Enforce Internal Revenue Service Summons.

DATED: 5/15/78

/s/ NOEL P. FOX
Chief United States District Judge

CERTIFIED AS A TRUE COPY
Gerald H. Liefer, Clerk.

BY /s/ G. E. LARINK, Deputy Clerk.

May 16, 1978.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1277

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS,
Petitioners-Appellees

v.

THE UPJOHN COMPANY and GERARD THOMAS
in his official capacity,
Respondents-Appellants

Order Denying Petition for Rehearing

Filed September 10, 1979

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges

No judge of the court having moved for rehearing *en banc*, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1277

UNITED STATES OF AMERICA and DAVID E. NOWAK, IRS,
Petitioners-Appellants,

v.

THE UPJOHN COMPANY and GERARD THOMAS
in his official capacity,
Respondents-Appellants.

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges

Judgment

Filed June 28, 1979

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed

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in part, reversed in part and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: September 17, 1979

A True Copy.

Attest:

/s/ JO ANN MCHALE
Deputy Clerk

APPENDIX G

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * *

(b) To ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427 (g)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * *